



# ATHENS-CLARKE COUNTY, GEORGIA

## OFFICE OF THE ATTORNEY

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To: Board of Election Members  
Charlotte Sosebee, Director of the Athens-Clarke County Board of Elections

From: Judd T. Drake  
County Attorney

Date: June 12, 2020

Re: Votes for Commissioner NeSmith in Recent Election for District Six  
Commissioner and Special Election to Fill the District Six Commission Seat

### **I. Votes for Commissioner NeSmith in Recent Election for District Six Commissioner**

The first section of this memorandum is in response to the request of Charlotte Sosebee, as Director of the Athens-Clarke County Board of Elections, for our office to provide guidance related to how the Board of Elections should treat votes cast for Commissioner Jerry NeSmith, who passed away unexpectedly last weekend, in the recent election for District Six Commissioner. The guidance provided by the Supreme Court of Georgia in *Jones, et al., v. Norris*, 262 Ga. 468 (1992), appears to be determinative with respect to this issue.

In this case, the Supreme Court of Georgia was called upon to determine whether votes cast for Larry Hulvey, a candidate who had withdrawn from a race for the Office of Superintendent of Schools in Wayne County, should have been counted. In reversing the judgment of the trial court, the Supreme Court held, based upon the following reasoning, that the votes for Larry Hulvey should not have been counted:

Title 21 of the Code, governing the conduct of primaries and general elections, makes no provision for this situation where vote recorder ballots are used to cast votes for the candidates, as was done here. However, OCGA § 21-2-438(a), governing the conduct of elections using paper ballots, provides that “[i]n primaries, votes cast for candidates who have died, *withdrawn*, or been disqualified shall be void and shall not be counted.” (Emphasis supplied.) We make no distinction between a paper ballot marked by a pencil and a cardboard ballot “marked” by a punch. We hold that the vote recorder ballots used by Wayne County are governed by the provisions of OCGA § 21-2-438(a) in absence of statutory authority to the contrary. As such, the votes cast for Larry Hulvey were void and should not have been counted . . . . *Jones, et al., v. Norris*, 262 Ga. at 468.

Similarly, the provisions of the Official Code of Georgia governing Georgia's newly implemented optical scanning voting system, defined by O.C.G.A. § 21-2-2 (19.1) as a

“system employing paper ballots on which electors cast votes with a ballot marking device or electronic ballot marker after which votes are counted by a ballot scanners” fail to provide any guidance related to whether votes cast for a candidate who has died should be counted. Thus, in accordance with the guidance of the Supreme Court of Georgia in *Jones, et al., v. Norris* discussed above, one must again look to O.C.G.A. § 21-2-438(a), governing the conduct of elections using paper ballots, for the answer to Director Sosebee’s inquiry. This statute, the pertinent language of which has not changed since the *Jones* decision, provides that “[i]n elections, votes cast for candidates who have *died*, withdrawn, or been disqualified shall be void and shall not be counted.” O.C.G.A. § 21-2-438(a) (emphasis added). In addition, O.C.G.A. § 21-2-437(d), the preceding statute in the Official Code of Georgia, also provides that “[i]n elections, votes cast for candidates who have died, withdrawn, or been disqualified shall be void and shall not be counted.” Accordingly, the relevant legal authorities lead to the conclusion that any votes cast for Jerry NeSmith in the election for District 6 Commissioner are void and should not be counted.

This conclusion is supported by legal analysis discussing the effect of a death or disqualification of a candidate upon the results of an election as published in *The Resolution of Election Disputes: Legal Principles That Control Election Challenges* (2<sup>nd</sup> ed., 2008) by Barry H. Weinberg, former Acting Chief of the Voting Section of the Civil Rights Division of the U.S. Department of Justice. Weinberg explains that the decision in *Jones* is “opposite from the majority view [nationally] that says that the votes cast for a candidate who died ... should be included when determining the outcome of the election” because “[i]n *Jones*, there was a statute [O.C.G.A. § 21-2-438(a)] directly on point that commanded that the votes for Larry Hulvey not be included in the vote totals.” *Id.* at 118. Weinberg explains the reasoning behind the Supreme Court of Georgia’s decision in *Jones* as follows:

What led the Georgia Supreme Court in *Jones* to ignore the majority view?... In *Jones*, there was a statute directly on point that commanded that the votes for Larry Hulvey not be included in the vote totals. So they were not, and the trial court’s decision to the contrary was reversed. This conclusion was anticipated by *Thompson v. Stone*, 53 S.E.2d 458 (Ga. 1949), which was cited in *Tellez* [an Arizona Supreme Court case] as one of the cases that follows the “American Rule,” which is the majority rule, that the votes cast for an ineligible candidate should be included when determining the outcome of the election. There, 43 years before *Jones*, the Georgia Supreme Court laid the foundation for *Jones* even while it said that it would follow the “American Rule.”

The American doctrine, supported by an undoubted preponderance of authority, is that though the candidate receiving the highest number of votes because of his ineligibility fail of an election [sic], yet the votes cast for him are so far effectual as to prevent the election of other candidates, and there is no election at all [citing cases from

Wisconsin, California, Louisiana, Missouri, Mississippi and Pennsylvania]. *Unless the votes for an ineligible person are expressly declared to be void*, the effect of such person receiving a majority of the votes cast is, according to the weight of the American authority and the reason of the matter, that a new election must be held, and is not to give the office to the qualified person having the next highest number of votes.

At 462 (emphasis supplied).

The statute relied upon by the Georgia Supreme Court in *Jones* in 1992 is exactly the kind of express declaration that the supreme court in *Thompson* said in 1949 would counteract the "American Rule." (Footnote omitted.) Thus, *Jones* and *Thompson* give us the final version of the legal principle that governs situations where votes were cast for an ineligible candidate: the votes cast for a candidate who is ineligible to take office will be counted in determining who won the election *unless a statute voids those votes*. *Id.* at 118-119 (Emphasis added).

Weinberg is correct that the majority rule across the United States is the "American Rule," which requires that votes for the deceased candidate be counted. This is in contrast to the minority "English Rule," followed by Georgia since 1951. At least three other states also appear to follow the English Rule: Montana, Massachusetts, and Wisconsin. See *State ex rel. Wolff v. Geurkind*, 111 Mont. 417 (1941), *State ex rel Bancroft v. Frear*, 144 Wis. 79 (1910), and *Madden v. Board of Election Com'rs of City of Boston*, 251 Mass. 95 (1925).

In summary, in accordance with the "English Rule," as codified in O.C.G.A. § 21-2-437(d) and O.C.G.A. § 21-2-438(a), and the Supreme Court of Georgia's decision in *Jones*, any votes cast for Jerry NeSmith in the election for District 6 Commissioner are void and should not be counted by the Board of Elections. O.C.G.A. § 21-2-285.1 provides guidance related to the holding of nonpartisan elections and provides in pertinent part that "[t]he candidate having a majority of the votes cast in the nonpartisan election . . . shall be declared duly elected to such office." Thus, as all votes cast for Mr. NeSmith are void and shall not be counted, Mr. Houle, as the sole remaining candidate, would be the candidate having a majority of the votes cast in the election for District Six Commissioner and should be declared duly elected to such office by the Board of Elections.

Agonizingly, this conclusion leads to a harsh result for those individuals who voted for Mr. NeSmith in the election for District 6 Commissioner. While the General Assembly has more specifically addressed the issue of the death, disqualification, or withdrawal of a candidate for certain *partisan* elections by allowing for the designation of a "substitute nomination," see *e.g.*, O.C.G.A. § 21-2-134, the General Assembly has not specifically addressed this issue for *nonpartisan* local elections, such as those elections for the

members of the governing authorities of consolidated local governments across Georgia. Therefore, this result might indicate a need for the General Assembly to consider amending O.C.G.A. § 21-2-437(d) and O.C.G.A. § 21-2-438(a). In that regard, I find it appropriate to reference the acknowledgement by Judge Harold Melton, the Honorable Chief Justice of the Supreme Court of Georgia, of similar public concern as recently set forth in his concurring opinion in *Barrow v. Raffensperger*, related to the “merits and demerits of judicial appointments” under Georgia’s current legal framework.

The genius of our democracy is that, to the extent the people of Georgia now second-guess the system of elections and appointments they ratified in the 1983 Constitution, they have the power to seek amendment to that foundational document. But it is not the job of judges to usurp that power by rewriting constitutional provisions ratified by the people, or *by rewriting laws enacted by the people’s democratically elected representatives.* *Barrow v. Raffensperger*, No. S20A1029, 2020 WL 2485188, at \*22 (Ga. May 14, 2020) (Emphasis added).

I further find it appropriate to acknowledge that it is highly likely that individuals who voted in support of Mr. NeSmith might elect to challenge the constitutionality of both O.C.G.A. § 21-2-437(d) and O.C.G.A. § 21-2-438(a) as depriving those individuals’ right to vote. Any such challenge will face a difficult hurdle as “[t]he General Assembly is presumed to enact laws with full knowledge of the condition of the law and with reference to it, and the courts will not presume that the legislature intended to enact an unconstitutional law.” (Footnotes omitted.) *Bd. Of Public Ed. v. Hair*, 276 Ga. 575, 576(1), 581 S.E.2d 28 (2003).” *Brodie v. Champion*, 281 Ga. 105, 105 (2006). According to Article II, Section I, Paragraph I of the Constitution of the State of Georgia, elections are to be “conducted in accordance with procedures provided by law.” “Employing this constitutionally derived power,” the General Assembly has enacted O.C.G.A. § 21-2-437(d) and O.C.G.A. § 21-2-438(a) as the procedures governing how votes for candidates who have died or been disqualified should be treated. *See, e.g., Brodie v. Champion*, 281 Ga. 105, at 106 (2006) (“To conclude that the General Assembly does not have the constitutional power to regulate the counting of write-in votes for unqualified write-in candidates would be to undermine the power expressly provided to the General Assembly under the Constitution.”)

Notwithstanding the foregoing, as authorized by O.C.G.A. § 21-2-40(a)<sup>1</sup> and in accordance with the presumption of constitutionality noted above, the Board of Elections is required under O.C.G.A. § 21-2-70 to perform all the duties imposed upon the Board as the election superintendent by the Georgia Election Code including, but not limited to, the procedural mandates of the General Assembly as set forth in O.C.G.A. § 21-2-437(d) and O.C.G.A. § 21-2-438(a). Thus, any determination related to the constitutionality of these code sections would need to be made by a court law.

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<sup>1</sup> O.C.G.A. § 21-2-540(a) authorizes the General Assembly to create a board of elections with the powers and duties of the election superintendent with respect to the conduct of primaries and elections. The local legislation of the General Assembly creating the Athens-Clarke County Board of Elections can be found at 1993 Ga. Laws 4631-4636, §§ 1-12, as amended by 2002 Ga. Laws 3541-3544, §§ 1-2.

## **II. Special Election to Fill the District Six Commissioner Seat**

The second section of this memorandum is in response to the request of Jesse Evans, as Chairman of the Athens-Clarke County Board of Elections, for our office to provide guidance related to whether any special elections will need to be held to fill the District Six Commission seat as a result of Commissioner NeSmith's death.

Based upon the legal analysis set forth in Section I. above, a special election will not need to be held to fill the District Six Commission seat for which an election was held on Tuesday, June 9, 2020, as Mr. Houle has been duly elected to such office. It bears noting that O.C.G.A. § 21-2-504(a) provides for calling a special election in certain instances "[w]henver any primary or election shall fail to fill a particular nomination or office and such failure cannot be cured by a run-off primary or election." However, O.C.G.A. § 21-2-504(a) is not applicable in this instance as the election held on Tuesday, June 9, 2020, did not fail to fill the District Six Commission seat.

A special election will need to be held to fill the remainder of Commissioner NeSmith's current term as District Six Commissioner. Section 2-106 of the Charter of the Unified Government of Athens-Clarke County, Georgia governs the procedure for the "Filling of vacancies" during a current commission term and provides as follows:

(a) In the event that the office of a member of the commission shall become vacant by reason of death, resignation or any other cause, and the term shall expire in less than one hundred eighty (180) days, the vacant position shall be filled by appointment of the remaining members of the commission. Any individual so appointed must have the same qualifications required for election to the office.

(b) If the term of the vacant commission position will continue for more than one hundred eighty (180) days, a special election shall be held as provided in this Charter and in general state law to elect a new member of the commission to serve for the remainder of the term.

Thus, as Commissioner NeSmith's term had more than one hundred eighty (180) days remaining when it became vacant, a special election will need to be held in accordance with section (b) above to fill the remainder of Commissioner NeSmith's current term. O.C.G.A. § 21-2-540(c)(B)(iii) governs the "Conduct of special elections generally" and provides that in even numbered years, any special election following the date of the general primary shall only be held on "[t]he Tuesday after the first Monday in November." Thus, a special election to fill the remainder of Commissioner NeSmith's current term as District Six Commissioner will need to be held on Tuesday, November 3, 2020.